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# Robert D. Gunnell

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RECEIVED

SEP 06 1996

Environmental Cleanup Office

September 3, 1996

Tim Brincefield, Project Manager  
U.S. EPA Region 10  
1200 Sixth Avenue  
Seattle, Washington 98101

RE: Monsanto Elemental Phosphorus Plant Super Fund Site  
Public Comment

Dear Mr. Brincefield:

I would like to take this opportunity to comment on the public hearing held in Soda Springs, Idaho on August 13, 1996. My comments will also express opinion and concern over the apparent favored alternative for clean-up.

My name is Robert D. Gunnell and I am an owner and spokesman for the Earl Gunnell & Sons, Inc. entity. We own the 200 acres of ground immediately adjacent to and north of the Monsanto Plant. According to the public hearing and published documentation, Soil Sample Test No.'s S-11 thru S-15 were taken on our property and all showed results in excess of the allowable or in excess of the MCL's.

I am disturbed that Monsanto's (and apparently EPA's) preferred solution to this serious problem is to push for adoption of a county ordinance prohibiting certain uses of private property that Monsanto does not even own. Not only may this approach give rise to a state law zoning claim, it may well constitute a regulatory "taking" of private property in violation of the Fifth Amendment, by interfering with the use and enjoyment of our property, see Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), Dolan v. City of Tigard, 114 S. Ct. 2309 (1994). I can assure you that our family will lobby strenuously against any rezoning efforts designed to avoid Monsanto's liability for contaminating our property.

There is little doubt that Monsanto has caused substantial damage to our private property and had significantly impaired its sale and marketability. Lending institutions are very suspect of property that is contaminated with hazardous waste or is located near a "Superfund" site. Moreover, they usually require a Level 1 or Level 2 environmental study before committing funds on a property title transfer. In this case, the extensive study conducted by Monsanto and the EPA has already confirmed that our property is contaminated and that hazardous waste exists at unacceptable levels. Thus, we need to ensure that the 80-acre parcel and possibly the entire 200 acres of impacted property that we own is free of any cloud on the title that would inhibit its marketability. Our position is that the polluter should clean up the property, not by convenient zoning, nor by biological treatment, which may be effective but certainly ties up the ground from production for who knows how long, but by excavation, removal, and replacement.

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At the hearing, you indicated that the only restricted use was residential and that the property owner could make other uses of the property. This appears to be a direct contradiction to statements made in the "EPA Proposed Plan, Monsanto Elemental Phosphorus Plant published July 29, 1996 and made available at the Public Hearing. Allow me to Quote Page 11, Paragraph 5 - Short-Term Effectiveness

Alternative 8 (excavation) could achieve soil cleanup goals faster than Alternative 5 but could pose greater risks to workers and residents associated with potential exposure during soil excavation:

Evidently you are concerned about the risk of the workers performing the clean-up, but not at all concerned about the farmer (our family), who stirs up the same dust year after year during the farming process. If you have ever sat on a tractor and been enveloped by the cloud of dust resulting from plowing, harrowing, discing, or harvesting, you may reconsider your inference. Our family is concerned that the continual ingestion of the contaminated dust is hazardous to our health and we should receive the same degree of concern expressed for the workers performing the excavation.

As you know, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. & 9601 et sz. ("CERCLA") has a strong "polluter pays" policy, and includes a private right of action to encourage remediation of environmental hazards. Id. at § 9607 (a); In re Dant & Russell, Inc., 951 F. 2d 246, 248 (9th Cir. 1991); Wickland Oil Terminals v. Asarco, Inc., 792 F. 2d. 887m, 892 (9th Cir. 1986). In addition, private nuisance, trespass, and negligence laws afford private landowners considerable relief from the infringement of "big industry" under similar circumstances.

In conclusion, allow me to say thanks for the public hearing process and the opportunity to give comment. Hopefully the comment will not fall on "deaf ears" or become lost in the governmental agency paperwork shuffle. We disagree very strongly with the convenient rezoning proposal and will pursue with some diligence the requirement to cleanup by excavation, removal, and replacement. Monsanto is the polluter. Why should we, the "Gunnell Family" and the effected private property owner, suffer the loss of use or be subjected to the potential danger of exposure.

Hopefully our concern will receive your most ardent consideration.

Sincerely,



Robert D. Gunnell